IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78- 425

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in these cases on June 16, 1978.

OPINIONS BELOW

Two cases involving identical issues and complementary fact situations under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act are brought to the Court for the second time in this Petition. Both cases were dealt with in a single opinion by the Court of Appeals for the Fifth Circuit, reported sub nom *Perdue v. Jacksonville Shipyards, Inc.*, 539 F.2d 533 (1976), and reprinted as Appendix C to this Petition, *infra*, pages 30 to 55. The Court vacated the judgments based on that 1976 opinion and remanded these cases to the Court of Appeals for the Fifth Circuit for reconsideration in light of the Court's opinion in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977). The Court's Order of Remand is reported at 433 U.S. 904 (1977), and is reprinted as Appendix B to this Petition, *infra*, page 29.

After remand to the Court of Appeals for the Fifth Circuit from the Court, the Court of Appeals reaffirmed its earlier decision based on its prior opinion cited above. The court's brief opinion reaffirming its prior decision is reported at 575 F.2d 79 (5th Cir. 1978), and is reprinted as Appendix A, hereto, *infra*, pages 27 to 28.

These cases had previously reached the Court of Appears upon petition for review from the administrative tribunals of the United States Department of Labor. In both cases, the Administrative Law Judge found no federal jurisdiction, the Benefits Review Board reversed, and the Court of Appeals for the Fifth Circuit affirmed the Benefits Review Board. The opinion of Administrative Law Judge Vanderheyden in the *Ford* case is not

reported but is printed as Appendix B to the original Petition for Certiorari in these case, No. 76-641, pages 31 to 51.[1] The opinion of the Benefits Review Board of the Department of Labor in *Ford* is reported at 1 BRBS 367, and is reprinted as Appendix C to the original Petition for Certiorari, No. 76-641, pages 52 to 58. The opinion of Administrative Law Judge Devaney in the *Bryant* case is not reported but is reprinted as Appendix D to the original Petition for Certiorari, No. 76-641, pages 59 to 87. The opinion of the Benefits Review Board in *Bryant* is reported at 2 BRBS 408 and is reprinted as Appendix E to the original Petition for Certiorari, No. 76-641, pages 88 to 95.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit on remand from the Court was rendered on June 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED

1. Whether by the 1972 Amendments to the Longshoremen's Act,[2] Congress intended to extend the jurisdiction of the Act ashore to categories of non-amphibious, warehouse or terminal workers who satisfy none of the Court's post-amendment criteria for such jurisdiction, as enumerated in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977), because:

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1. The Clerk having advised that the printing of these opinions in the Appendix to the Original Petition for Certiorari is sufficient and available to the Court, they are not reprinted here.

2. The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, et seq., was amended October 27, 1972, Public Law 92-576.

a. Prior to the 1972 Amendments they had, and still have, a uniform compensation system which provides "continuous coverage throughout their employment,"[3] and therefore are not subject to the "shifting and fortuitous coverage that Congress intended to eliminate;"[4]

b. They are not "amphibious workers," i.e., not subject to being assigned to work both aboard vessels and on land in the course of their employment;[5]

c. They never perform any work on navigable waters, and

d. They never unload (physically remove and store in warehouse) cargo from or load (physically remove from warehouse and place) cargo onto a vessel.

2. Whether employee Bryant meets the "status test" required for Longshoremen's Act jurisdiction when as a "cotton header" (terminal worker) he was unloading cotton bales from a cotton dray wagon and storing them in a pierside warehouse to await the subsequent arrival in port (five days later) of the vessel on which the cotton was to be loaded (physically removed from such storage and placed aboard the vessel) by a stevedoring company completely independent from and unrelated to Bryant's employer?

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3. *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, at 273 (1977).

4. Id. at 274.

5. Id. at 273.

3. Whether the employee Ford meets the "status test" required for Longshoremen's Act jurisdiction when as a member of a warehouse labor gang he was securing a military vehicle onto a railroad car on the dock after the vehicle had been in storage on or near the dock since the time the delivering vessel had sailed (two to seventeen days before), and Ford's employer had in no way participated in the unloading (physical removal from vessel and placing in storage area on dock) of the military vehicle from the vessel?

4. In reaching conflicting results on the basic jurisdictional issue of the extent to which Congress intended to extend the Longshoremen's Act ashore, the various Courts of Appeals also reached conflicting and diverging results on two subsidiary questions which are important to the court's decision below:

a. What, if any, weight is to be given to the statutory presumption that a claim comes within the provisions of the Act, 33 U.S.C.A. § 920, which this Court has held to be inapplicable when there is substantial evidence in the record on the facts at issue?[6]

b. What, if any, deference is owed by a Court of Appeals to the holdings of the Benefits Review Board on the question of the statutory jurisdiction of the Longshoremen's Act?[7]

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6. See full discussion *infra,* p. 22.

7. See full discussion *infra,* p. 23.

STATUTE INVOLVED

The relevant portions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, are as follows:[8]

Section 2(3), 86 Stat. 1251, 33 U.S.C. § 902(3):

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

Section 2(4), 86 Stat. 1251, 33 U.S.C. § 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

Section 3(a), 86 Stat. 1251, 1265, 33 U.S.C. § 903 (a):

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). * * *

8. The sections of the legislative Committee Reports pertaining to shoreside jurisdiction are identical in both the Senate and House of Representatives, and occur in 1972 U. S. Code Congressional and Administrative News 4698, at 4707-4708.

STATEMENT OF THE CASE

In 1977, this Court rendered its first decision interpreting the 1972 shoreside extension of Longshoremen's Act jurisdiction.[9] The present two cases[10] were pending in this Court at that time. After its decision in *Caputo,* this Court vacated the judgments of the Court of Appeals in these cases and remanded them for reconsideration in light of *Caputo.*[11]

Petitioners are employers[12] of persons who work in the dockside areas adjoining navigable waters. The respondent employees are workers who sustained injuries while transferring bulk cargo to or from land transportation in a shoreside storage area.[13] At the time of his injury,[14]

9. *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977).

10. Two cases presenting complementary fact situations (loading/unloading) were decided together by the court below and have been brought to this Court in a single petition. Rule 23(5), Rules of the Supreme Court of the United States.

11. 433 U.S. 904 (1977), Appendix B, *infra,* p. 29.

12. And their compensation insurance carrier.

13. It is not disputed that both accident sites were geographically in cargo handling areas adjoining navigable waters.

14. April 12, 1973 at the Port of Beaumont, Texas. The Administrative Law Judge below made full fact findings based on stipulations, and these fact findings are reprinted in his opinion below. App. p. 33 in No. 76-641. Petitioners have accordingly not deemed it necessary to reprint at this time the stipulations from the record below.

Respondent Ford was standing on a railroad flatcar securing a military vehicle for carriage to an inland arsenal. The military vehicle had been returned to the United States on a ship and had been stored in an open, shoreside storage area pending its on-carriage by rail. The ship which delivered the military vehicle had departed prior to the day of the accident,[15] and Ford and his co-workers were hired from the Warehousemen's Local Union of the International Longshoremen's Association to secure the military vehicles on the railcars. No ship was at the dock, and in any event, the applicable labor contract would have prohibited these workers from the Warehousemen's Local Union from working aboard ships or assisting in the movement of cargo directly to or from ships.

Respondent Bryant[16] was injured while standing on a cotton dray wagon utilized to bring cotton bales from the compress company to a shoreside warehouse for eventual shipment overseas. He was assisting the wagon driver in unloading the bales from the wagon and "heading" them into a storage location in the pier-side warehouse. The cotton bales being handled were subsequently loaded aboard a ship which arrived in port five days after Bryant's injury. Petitioner (Bryant's em-

15. The military vehicles being loaded that day had arrived on one of two ships, and had been unloaded from the ship and placed in the storage area either two or seventeen days before Ford's accident. The Petitioner (Ford's employer) had not participated in any way in the unloading of either of the ships.

16. May 2, 1973, at the Port of Galveston, Texas. The Administrative Law Judge below made full fact findings based on the stipulations, and these fact findings are reprinted in his opinion below. App. p. 62 in No. 76-641. Petitioners have accordingly not deemed it necessary to reprint at this time the stipulations from the record below.

ployer) performs no ship loading or unloading work at any time, and the bales in question were eventually loaded aboard ship (physically removed from warehouse and placed aboard ship) by a stevedoring company completely unrelated to Bryant's employer. In fact Bryant's employer never loaded or unloaded any vessels.[17] Neither Ford nor Bryant satisfies any of the four criteria on which the Court relied in holding Caputo covered: (1) Neither was a member of a regular stevedoring gang who "participated on either the pier or the ship in the stowage and unloading of cargo".[18] (2) Both were hired as terminal or warehouse laborers and were not subject to being assigned to load or discharge vessels. (3) Both were aware of their work assignments being limited to warehouse work and not subject to being changed during the day. (4) Both had a perfectly uniform compensation system (state law) which covered all of their work activities both before and after the 1972 amendments to the Longshoremen's Act. These are the four factors on which the Court relied in finding "amphibious workers" such as Caputo to be engaged in maritime employment and therefore covered by the Longshoremen's Act, even though not engaged in "longshoring operations" but in the "old fashioned process of putting goods already unloaded from a ship or container into a delivery truck".[19] Upon remand, the Court below obviously did not consider these four factors to

17. Bryant's employer does have some employees who do go aboard ship in the course of their ship agency duties, but the applicable labor contract pursuant to which Bryant was hired precludes Bryant or any other "cotton header" from doing so.

18. 432 U.S. at 273.

19. Id. at 272.

be of any significance (since none was present in Bryant or Ford), and adhered to its earlier holding that all work which is "an integral part of the process of moving maritime cargo from ship to land transportation" or vice versa is covered if performed in an area meeting the "situs test."[20] Thus, these two cases squarely present the ultimate question which the Court declined to reach in *Caputo*:

> Whether the Longshoremen's Act, as amended in 1972, covers "all physical cargo handling activity anywhere within an area meeting the situs test"[21] or only those "amphibious workers" such as Caputo who had no uniform compensation remedy prior to the 1972 Amendments?

REASONS FOR GRANTING THE WRIT

1.

In its prior opinion and current decisions in these cases, the court below has specifically adopted the position urged by the Director, Office of Workers' Compensation Programs, but declined by the Court in its *Caputo* opinion, and in doing so, its decisions are in direct conflict with:

1. The "status test" standards for Longshoremen's Act jurisdiction ashore applied by the Court in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977); and with the historical

20. 539 F.2d 533, at 543; Appendix C, *infra,* p. 30, at 47.

21. The position asserted by the Director of the Office of Workers' Compensation Programs before the Court in *Caputo,* 432 U.S. at 272 and Footnote 34.

definition of "maritime employment" under the Act in *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (1953) and *Noguiera v. New York, N.H. & H.R. Co.,* 281 U.S. 128 (1930).

2. The opinion of the Court of Appeals for the Ninth Circuit in *Cargill, Inc. v. Powell,* 573 F.2d 561 (9th Cir. 1977), Petition for Certiorari pending, No. 77-1543, *Powell v. Cargill, Inc., et al,* which is reprinted as Appendix D to this Petition, *infra,* pages 56 to 65.

3. The opinion of the Court of Appeals for the Fourth Circuit in *Conti v. Norfolk & Western Railway Company,* 566 F.2d 890 (4th Cir. 1977), which is reprinted as Appendix E to this Petition, *infra,* pages 66 to 77.

2.

These conflicts pertain to the most important question of the statutory jurisdiction ashore of the Longshoremen's Act as amended in 1972 and require prompt and authoritative resolution by the Court. The Solicitor General has expressly acknowledged and noted both the conflict with the Ninth Circuit's decision in *Powell* and the importance of the issue in his Memorandum For Federal Respondent related to the Petition for Certiorari in the *Powell* case.[22] In so doing the Solicitor General has urged that this Petition be considered together with *Powell,* and that this Court grant review in these cases to resolve the conflict on this "important issue which has divided two major deep water circuits."[23] Apart from the conflict with the

22. No. 77-1543, *Powell v. Cargill, Inc., et al,* Memorandum For Federal Respondent, page 4, 5.

23. Id., at page 5.

Ninth Circuit (and the Fourth Circuit as well), the importance of the issue is perhaps best demonstrated by the fact that since the 1972 Amendments more than 50% of all injuries reported under the Longshoremen's Act have been based on the Act's extension ashore and clearly would not have been covered prior to the 1972 Amendments because the Act's jurisdiction stopped at the water's edge.[24]

I. Conflict with the Decisions of this Court.

A.

The holding of the court below that injured employees, Bryant and Ford, were engaged in "maritime employment" at the time of their injuries is directly in conflict with the Court's recent decision in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977), and with the Court's earlier decisions in *Pennsylvania Railroad Co. v. O'Rourke,* 344 U.S. 334 (1953), and *Noguiera v. New York, N.H. & H.R. Co.,* 281 U.S. 128 (1930).

In its *Caputo* opinion, the Court discussed the "maritime employment" requirement of Section 2(3) of the Longshoremen's Act, as amended in 1972. The Court recognized that the 1972 amendments created a dual situs/status test for coverage, and that the 1972 amendments made it "necessary to describe affirmatively the class of workers Congress desired to compensate."[25] For break-bulk cargo handlers such as Caputo, Ford, and Bryant, the Court analyzed the status question in terms of the dominant Congressional theme calling for a "uniform compensation system" to apply to employees who would otherwise be covered by this Act for part of their activity.[26] The Court found it clear that Congress "had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 amendments, would be covered for only part of their activities."[27] *Caputo* was held to be such a person because

> ". . . as a member of a regular stevedoring gang, he participated on either the pier *or the ship* in the stowage or unloading of cargo. On the day of his injury he had been hired by petitioner *Northeast* as a terminal laborer. In that capacity, he *could have been assigned* to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, *loading and discharging lighters and barges,* and loading and unloading trucks. Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact the assignment *could have changed during the* day. Thus, had Caputo avoided injury and completed loading the company's truck on the day of the accident, he then could have been assigned to unload a lighter. . . . Since it is clear that he would have been covered while unloading such a vessel, to exclude him from the Act's coverage in the morning but include him in the afternoon would be to revitalize the shifting and fortuitous coverage that Congress

24. *Nacirema Operating Co. v. Johnson,* 396 U.S. 212 (1969).

25. 432 U.S. at 264.

26. 432 U.S. at 272. The Court recognized the irrelevancy to break bulk cargo handlers of the other primary motivation for the extension of the Act's jurisdiction ashore when it said: "The Congressional desire to accommodate the Act to modern technological changes is not relevant to Caputo's case, since he was injured in the old fashioned process of putting goods already unloaded from a ship * * * into a delivery truck." 432 U.S. at 271, 272.

27. 432 U.S. at 272.

intended to eliminate." (Emphasis supplied). 432 U.S. at 273-274.

By way of contrast, Bryant not only had no regular employment as a longshoreman (member of a stevedore gang loading or unloading ships), he had had no employment in "indisputably longshoring operations"[28] for at least five years prior to his injury! His work assignment "could (not) have changed during the day"—he absolutely could not have done ship loading or unloading work because his employer never loaded or unloaded vessels. He knew exactly the type of work he was employed for on any given day and knew he could not possibly be assigned to longshore work "on either the pier or the ship in the stowage or unloading of cargo." There was absolutely no possibility that his compensation coverage could shift during his work day. Both before and after 1972 he had a uniform compensation remedy under Texas law and could not possibly have come within the federal coverage "without the amendments," because he could not possibly have performed any of his work on the navigable waters in the course of his occupation as a cotton header.

Nor is Ford's employment pattern at all like Caputo's. During the year prior to his injury Ford worked for a beer distributing company, for a shoreside construction company, a total of 39 days as a warehouseman on the docks and only seven days as a longshoreman. This is in no way comparable to Caputo who was a member of a regular stevedoring gang. Additionally, Ford could not have been assigned aboard a vessel or to assist in loading or unloading a vessel, for he was working out of the Warehouseman's Local Union under the warehouseman's contract which expressly prohibited any such reassignment. He knew, when he hired out of the Warehouseman's Union Hall, that he could not be assigned to load or unload a ship. Like Bryant, and unlike Caputo, there was no possibility that his compensation coverage would shift or change because he had an absolutely uniform compensation remedy, and "without the amendments" he could never be covered by the Longshoremen's Act for any part of his activity.

28. Id. at page 272.

Thus neither Ford nor Bryant is an amphibious worker "like Caputo," and neither is nor could be subject to the "shifting and fortuitous coverage that Congress intended to eliminate."[29] They are not "persons like Caputo" and they are not "in maritime employment" as that status requirement is analyzed by the Court in *Caputo*.

In light of these undisputed facts, the holding of the court below on remand that its prior opinion was "consistent with the rationale" of the Court in *Caputo* is unfathomable. The court below attached no significance to any of the factors on which the Court relied in holding *Caputo* to be covered. It completely ignored the undisputed fact that neither worker was subject to any shifting coverage and that both had the same uniform compensation remedy they had had prior to the 1972 Amendments. Instead, the court below considered only whether the work "was an integral part of the ongoing process of moving cargo between land transportation and a ship," (Bryant)[30] or "from a ship to land transportation"

29. Id.

30. 539 F.2d 534 at 544; Appendix C, *infra*, page 50.

(Ford).[31] Thus, the court below embraces in full the view of the Director, Office of Workers' Compensation Programs, that the post-amendment coverage should reach "all physical cargo handling activity anywhere within an area meeting the situs test," or, as also stated in another way by the Director, "all physical cargo tasks performed on the waterfront and particularly those tasks necessary to transfer cargo between land and water transportation."[32] The Director's position and that of the court below effectively eliminate the maritime employment status test to which *Caputo* was directed in its entirety and makes situs only the test—a result Congress never intended.

The opinion of the Court below also directly conflicts with the Court's recognition in *Caputo* that "employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered".[33] The broad maritime employment status test of the Court below (and of the Director) would cover the driver of the cotton dray wagon who was helping Bryant remove the cotton bale from land transportation at the time of the injury, another clear and irreconcilable conflict with *Caputo*.

31. Id. at page 543; *infra*, page 47.

32. 432 U.S. at 272.

33. Id. at page 267. The Court makes this even more clear in footnote 37: "In addition, we reiterate that Caputo did not fall within the excluded category of employees 'whose responsibility is only to pick up stored cargo for further trans-shipment.' Sen. Rep., at 13; H. Rep., at 11. As we indicated supra, at 16-17, that exclusion pertains to workers, such as the consignees' truck drivers Caputo was helping, whose presence at the pier or terminal is for the purpose of picking up cargo for further shipment by land transportation." 432 U.S. at 274.

As the Court emphasized in *Caputo*, Congress set out to solve a uniformity problem when workers went back and forth across the water's edge during the course of a day's work. No such uniformity problem existed in 1972, and none exists now, as to persons such as Ford and Bryant whose assignments cannot cross the water's edge —their remedy remains unchanged and uniform throughout their work—the Workmen's Compensation Act of Texas. The opinion of the Court of Appeals below conflicts with the Court's refusal to adopt the Director's broad interpretation of the 1972 Amendments, and this Petition for a Writ of Certiorari should be granted to resolve this conflict.

B.

The second area of conflict with the Court's decisions lies in the area of the historical definition of the term "maritime employment," in the Longshoremen's Act as established in the Court's opinions in *O'Rourke*,[34] and *Noguiera*.[35] In *Noguiera*, the Court held that a railroad employee loading freight into railroad cars on a car float on navigable waters was in "maritime employment" as that term was used in the Act only because his work on the day of the accident was upon navigable waters in New York harbor.[36] In *O'Rourke*, the Court reaffirmed

34. *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334 (1953).

35. *Noguiera v. New York, N.H. & H. R. Co.*, 281 U.S. 128 (1930).

36. The Court also pointed out that this meaning of the term maritime employment was completely consistent with holdings of the Court prior to passage of the Longshoremen's Act, as in *State Industrial Commission v. Nordenholt*, 259 U.S. 263 (1922), that maritime employment for purposes of workmen's compensation laws

that this was the meaning of "maritime employment" as that term was used in the Act in the definition of employers to be covered by the Act.

The Court's decision in *Caputo* is also completely consistent with this historical definition of maritime employment in its requirement that a covered employee be subject to being assigned to work either on a vessel (navigable waters) or on the dock on the day of his accident. The decision of the court below is in direct conflict with this definition and this Petition should be granted to resolve the conflict.

II. Conflicts With Other Courts of Appeals.

A.

The Court should grant this petition to resolve the direct and irreconcilable conflict between the decision of the court below and the decision of the Court of Appeals for the Ninth Circuit in *Cargill, Inc. v. Powell,* 573 F.2d 561 (9th Cir. 1977), Petition for Certiorari pending.[37] In *Powell,* the Ninth Circuit held that a grain elevator employee whose duties were to unload grain from a railcar into a shoreside elevator from which it

did not include dockside cargo handling activities performed solely on the dock. In *Nordenholt,* the employee was stacking sacks of cement on the dock as they were being discharged from the ship, and the state court of New York had held that the maritime exclusivity doctrine of *Southern Pacific Co. v. Jensen,* 244 U.S. 205 (1917), precluded any state workmen's compensation remedy. The Court reversed on the basis that dockside cargo handling activities were not maritime employment, and thus there was no need to be concerned with the application of a uniform maritime law to such non-maritime employment, i.e. employment performed solely on the dock.

37. No. 77-1543, *Powell v. Cargill, Inc., et al.*

would be loaded into a vessel was not engaged in "maritime employment" and therefore not covered by the Longshoremen's Act. Powell was in precisely the same position with respect to the grain cargo as Bryant was to the cotton bales in the *Bryant* case. Both were unloading maritime cargo from shore transportation into a shoreside storage facility where it was stored to await eventual loading aboard a ship.[38] The Court below held that Bryant was covered by the Longshoremen's Act. The Ninth Circuit held that Powell was not covered by the Longshoremen's Act.

As previously indicated, the Solicitor General has acknowledged and asserted that *Powell* is in conflict with these *Bryant* and *Ford* cases in his "Memorandum For The Federal Respondent" on the still pending Petition For A Writ of Certiorari in *Powell.*[39] The only difference which the Solicitor General suggests is his allegation that Powell was a "longshoreman by trade, and Ford and Bryant were not."[40] While this is disputed by the Respondent Cargill, it demonstrates dramatically the absolute and irreconcilable conflict of Ford and Bryant with the Court's decision in *Caputo.* Ford and Bryant are not longshoremen by occupation or in any other sense of the word!

These three cases are in clear conflict, and squarely raise the most important question left unresolved by the Court in *Caputo*:

38. Likewise, Ford was in precisely the same position as Powell and Bryant, except he was loading maritime cargo onto land transportation rather than unloading it from land transportation.

39. No. 77-1543, *Powell v. Cargill, Inc., et al,* Memorandum For Federal Respondent, page 4, 5.

40. Id., page 5.

Whether all cargo handling activities in a shoreside area are covered by the Longshoremen's Act as amended in 1972.

The Petition should be granted to resolve this conflict.

B.

The second significant conflict with a recent decision of another Court of Appeals is with *Conti v. Norfolk & W. Ry. Co.*, 566 F.2d 890 (4th Cir. 1977). Like Bryant, Conti and his fellow workers were transferring cargo from land transportation to a shoreside facility from which it was to be loaded onto a vessel. The several tasks involved were directed to dumping coal from a railcar into a shoreside terminal area for the purpose of permitting the coal to be loaded aboard a ship. This is directly equivalent to the work Bryant was doing and conversely equivalent to Ford's work fastening cargo onto a railroad car. The Fourth Circuit held that Conti and his co-workers "were engaged in unloading a coal train, not loading a vessel." 566 F.2d at 895. Thus, the Fourth Circuit's decision is in accord with that of the Ninth Circuit in *Powell*.

The *Conti* case is a dramatic illustration of the conflict between the principles of Longshoremen's Act jurisdiction adopted by the Fifth Circuit below and the *O'Rourke* and *Nogueira* principles of the Court discussed above. The *Conti* workers were unloading railcars at a waterfront terminal facility. If the 1972 Amendments extended Longshoremen's Act coverage to these workers, as the Director's and Fifth Circuit's test would do,[41] then this

41. The Director, OWCP, would reach "all physical cargo handling activity anywhere within an area meeting the situs [test]," including "all physical tasks performed on the waterfront, and particularly those tasks necessary to transfer cargo between land and water transportation." *Caputo, supra*, 432 U.S. at 272, 53 L.Ed.2d at 338. The Court below looked to whether the task was "an integral part of the ongoing process of moving cargo between land transportation and a ship." 539 F.2d at 544, App. p. 50.

Court's opinions in *O'Rourke* and *Nogueira* would require that the Longshoremen's Act be Conti, et al's exclusive remedy in derogation of the FELA railroad employee remedy. This exclusivity defense was the issue treated in *Conti*, but the Court of Appeals avoided the overlapping jurisdiction problem by holding that Conti's work unloading shore transportation was not maritime employment and therefore not within the jurisdiction of the Longshoremen's Act. The court looked to the "basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel." 566 F.2d at 895. It is this "basic fact" that the Fifth Circuit (and the Director) has overlooked in the Ford and Bryant cases below: Ford was loading a railroad car, Bryant was unloading a dray wagon. Like Conti, Ford and Bryant did not have traditionally maritime occupations as described in *Caputo* and *O'Rourke*. Under *Conti*, the Fourth Circuit would hold Ford and Bryant not covered by the Longshoremen's Act. The Fifth Circuit in the opinion below has held that they are covered, as would the Director's status test. This petition should be granted to resolve this clear conflict between the circuits, especially in view of the important implications for FELA coverage illustrated by the *Conti* case.[42]

42. The Fourth Circuit observed that Congress did not intend to supplant FELA remedies with Longshoremen's Act remedies, 566 F.2d at 895. Indeed not, and this illustration of unconsidered overlaps in jurisdiction demonstrates that Congress did not intend to extend Longshoremen's Act jurisdiction beyond the problem of non-uniform coverage for which a solution was sought.

STATUTORY PRESUMPTION AND JUDICIAL DEFERENCE

In reaching its decision below, the Court of Appeals relied on two principles of decision which have been discredited and rejected by other courts of appeal in similar shoreside jurisdiction cases—employment of a statutory presumption in spite of a full evidentiary record and judicial deference to the Benefits Review Board on a question of interpreting the statutory jurisdiction of the Act.

This Court has long held the statutory presumption, 33 U.S.C.A. § 920, to be inapplicable when an evidentiary record on the issue is present. *Del Vecchio v. Bowers,* 296 U.S. 280, 286 (1935). The Administrative Law Judges below both found that substantial evidence existed on the jurisdiction issue. *Ford,* App. p. 50 in No. 76-641; *Bryant,* App. p. 86 in No. 76-641, and the court below should not have employed the presumption at all.

As a result, a clear conflict also exists among the Courts of Appeals with regard to the statutory presumption that a claim comes within the provisions of the Act. The court below considered itself "bound by a statutory presumption that an individual claim comes within the Act's coverage." 539 F.2d at 541, App. pp. 42-43. In contrast, a First Circuit panel said the basic interpretative decision concerning the jurisdictional applicability of the Act "must precede any application of the presumption." *Stockman v. John T. Clark & Son of Boston,* 539 F.2d 264, 269 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977). The Court of Appeals for the Second Circuit also stressed the inapplicability of the presumption to "an interpretation question of general import" such as the jurisdiction of the Act, *Pittston Stevedoring Corp. v. Dellaventura,* 544 F.2d 35, 48 (2d Cir. 1976), *aff'd sub nom Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977), while a Third Circuit panel wrote a jurisdiction opinion but apparently did not rely on or even mention the presumption at all. *Sea-Land Service, Inc. v. Director, O.W.C.P.,* 540 F.2d 629 (3d Cir. 1976). Finally, the opinion adopted in principle by the majority of the Court of Appeals for the Fourth Circuit sitting in banc is criticized by Judge Craven in dissent for its failure to give "sufficient weight, if any," to the statutory presumption. *I.T.O. Corp. of Baltimore v. Benefits Review Board, et al,* 529 F.2d 1080, 1091 (4th Cir. 1975), modified in banc, 542 F.2d 903 (1976), vacated and remanded, 433 U.S. 904 (1977), opinion on remand, 563 F.2d 646 (4th Cir. 1977). Thus the four other Courts of Appeals which have dealt with the jurisdiction of the amended Act in this context have not been constrained by the statutory presumption, while the court below said it was "bound" in its deliberations by that self-same presumption. A writ of certiorari in these cases should issue to correct the erroneous approach of the court below in its approach to fundamental jurisdictional questions.

A similar conflict exists with regard to judicial deference in this context. How much deference is owed by a Court of Appeals to the Benefits Review Board of the Department of Labor with regard to a fundamental question of statutory interpretation involving the extension of federal jurisdiction? The Courts of Appeals for the

First[43] and Second Circuits[44] have explicitly declined to defer to the Benefits Review Board, doubting any superiority of the administrative agency in matters of statutory interpretation[45] and criticizing the cursory treatment afforded by the Board to this important question.[46] By way of contrast, the court below explicitly declined to look beyond the Board's decision "so long as there is a reasonable legal basis for the Board's conclusions [citations omitted]" (539 F.2d at 541, App. p. 43). Indeed, in the *Bryant* case, the court specifically limited its analysis:

> "Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status." 539 F.2d at 544, App. p. 49.

Contrast the First Circuit statement in *Stockman* that "as the focus is upon the meaning of the statute, the judgment must be our own, not the Board's." 539 F.2d at 270. Even more significantly, the Court of Appeals for the Second Circuit in *Dellaventura* quoted this Court for the proposition that an " 'agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate' *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)," and "therefor reject[ed] the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong." 544 F.2d at 50. It is just such a "bootstrap" operation in which the Board has been engaged and to which the court below has given deference, and this Court should grant a writ of certiorari in these cases to correct this error and to establish the proper standard of judicial review of Benefits Review Board interpretation of the jurisdictional provisions of the Longshoremen's Act.

43. *Stockman v. John T. Clark & Son of Boston*, 539 F.2d 264 (1st Cir. 1976), *cert. denied* 433 U.S. 908 (1977).

44. *Pittston Stevedoring Company v. Dellaventura*, 544 F.2d 35, (2d Cir. 1976), *aff'd sub nom Northeast Marine Transport Co. v. Caputo*, 432 U.S. 249 (1977).

45. *Stockman, supra* n. 43, 539 F.2d at 269.

46. *Pittston, supra* n. 44, 544 F.2d at 47.

CONCLUSION

In view of the conflict of the decisions and opinion below with the prior decisions of the Court and with the contemporaneous decisions of various Courts of Appeals, and particularly in order to resolve authoritatively the extent to which the Longshoremen's Act Amendments of 1972 extended federal jurisdiction ashore, Petitioners respectfully pray that this Court grant a writ of certiorari and reverse the decisions of the court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-

P. C. PFEIFFER CO., INC. and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

DIVERSON FORD and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

---

and

AYERS STEAMSHIP COMPANY and
TEXAS EMPLOYERS' INSURANCE ASSOCIATION,
Petitioners

v.

WILL BRYANT and DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
Respondents

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX A

JACKSONVILLE SHIPYARDS, INC., and
Aetna Casualty & Surety Company, Petitioners,

v.

Herbert L. PERDUE and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

P. C. PFEIFFER COMPANY and
Texas Employers' Insurance Association, Petitioners,

v.

Diverson FORD and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

AYERS STEAMSHIP COMPANY and
Texas Employers' Insurance Association, Petitioners,

v.

Will BRYANT and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

Nos. 75-1659, 75-2289 and 75-4112.

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

June 16, 1978.

575 F.2d 79

Petitions for Review of Orders of the Benefits Review Board.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

PER CURIAM:

These Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1970) (amended 1972), cases[1] are on remand from the Supreme Court with instructions to reconsider them in light of *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). We find that our prior resolution of the coverage issues presented in each of these cases is consistent with the rationale expressed in *Caputo,* and, accordingly, we reaffirm our prior determinations as to the benefit eligibility of the affected maritime employees under the Act.

* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d)(1970).

1. Five cases are contained in the decision of this court in *Jacksonville Shipyards, Inc. v. Perdue,* 539 F.2d 533 (5th Cir. 1976). The three cases involved in the present remand are *Jacksonville Shipyards, Inc. v. Perdue* (No. 75-1659), *vacated and remanded,* 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1977); and *Ayers Steamship Co. v. Bryant* (No. 75-4112), which was consolidated with *P. C. Pfeiffer Co. v. Ford* (No. 75-2289), *vacated and remanded,* 433 U.S. 904, 97 S.Ct. 2966, 53 L.Ed.2d 1088 (1977).

APPENDIX B

NO. 76-641

P. C. PFEIFFER COMPANY, INC., ET AL.,
Petitioners,

v.

DIVERSON FORD ET AL.

433 U.S. 904, 53 L.Ed.2d 1088, 97 S.Ct. 2966.

June 27, 1977

On petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Petition for writ of certiorari granted, judgments vacated and case remanded to the Court of Appeals for further consideration in light of Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 53 L.Ed.2d 320, 97 S.Ct. 2348 (1977).

Same case below, 539 F.2d 533.

APPENDIX C

JACKSONVILLE SHIPYARDS, INC.,
and Aetna Casualty & Surety Company, Petitioners,

v.

Herbert L. Perdue and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

JACKSONVILLE SHIPYARDS, INC.,
and Aetna Casualty & Surety Company, Petitioners,

v.

Charles W. SKIPPER and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

P. C. PFEIFFER COMPANY and
Texas Employers' Insurance Association, Petitioners,

v.

Diverson FORD and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

HALTER MARINE FABRICATORS, INC.,
and Fidelity & Casualty of New York, Petitioners,

v.

John L. NULTY and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

AYERS STEAMSHIP COMPANY and
Texas Employers' Insurance Association, Petitioners,

v.

Will BRYANT and Director, Office of Workers' Compensation Programs, United States Department of Labor, Respondents.

NOS. 75-1659, 75-2833, 75-2289
75-2317 and 75-4112

UNITED STATES COURT OF APPEALS,
Fifth Circuit.

September 27, 1976.

Proceeding was brought to review awards to five shoreside workers, who were injured in course of their employment, under 1972 Amendments to Longshoremen's and Harbor Workers' Compensation Act by Benefits Review Board. The Court of Appeals, Tjoflat, Circuit Judge, held that Board properly awarded benefits to two workers who were handling maritime cargo on shore as well as to a carpenter who was fabricating parts for a new ship, but that Board misconstrued Act in extending coverage to shipboard worker who stumbled in front of his employer's office a mile from ship and to employee who was helping to tear down shed in disused marine repair facility; and that Congress, which could reasonably have felt that shipbuilding employees beside navigable waters were performing sufficiently maritime function to be covered by harbor workers' compensation statute, did not exceed its broad discretion by extending coverage to such work.

Affirmed in part and reversed in part.

* * *

Petitions for Review of Orders of the Benefits Review Board, United States Department of Labor.

Before TUTTLE, THORNBERRY and TJOFLAT, Circuit Judges.*

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* Judge Thornberry was a member of the panel that heard oral arguments but due to illness did not participate in this decision. 28 U.S.C. § 46(d)(1970).

TJOFLAT, Circuit Judge.

I

AN OVERVIEW OF THESE CASES

The Parties and Their Dispute. With these five vigorously contested appeals, petitioners and respondents join battle for the third time. Each individually named respondent is a shoreside worker who was injured in the course of his employment. These respondents claim that their injuries are covered by the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. §§ 901 *et seq.* (1970). In their fight for coverage, the workers have a new and virtually untested weapon, *viz.*, those portions of the 1972 Amendments which expanded the scope of the Act.[1] They also have a powerful and articulate ally in the other respondent, the Director of the Officer of Workers' Compensation Programs of the United States Department of Labor (the Director).[2] The forces arrayed against respondents consist of the workers' employers and the employers' insurance carriers.

1. Especially pertinent are new Sections 902(3) (definition of "employee"), 902(4) (definition of "employer"), and 903(a) (expanded situs provision in new Act). Despite the fact that more than three years have passed since the Amendment's effective date, litigation over the Act's new coverage is just now beginning to reach the courts. *See Weyerhaeuser Co. v. Gilmore,* 528 F.2d 957 (9th Cir. 1975). *See also I.T.O. Corp. v. Benefits Review Bd.,* 529 F.2d 1080 (4th Cir. 1975), *rehearing en banc granted* (4th Cir. Mar. 12, 1976).

2. As shall appear *infra,* there is a dispute as to whether the Director is a proper party respondent in this Court, or whether his status is merely that of *amicus curiae.* In Part V of this opinion, we hold that the Director is a proper respondent.

Procedural History. In each of the cases, a preliminary skirmish was fought before an Administrative Law Judge.[3] Reports from these battlefields show mixed results; petitioners won three of the engagements, and respondents two. The theater of operations then shifted to the Washington, D.C., headquarters of the Benefits Review Board of the Department of Labor (the Board).[4] The Board adopted an extremely liberal view of the Act's coverage, and respondents swept to victory in all five cases. After losing the fight in Washington, D.C., petitioners chose to escalate the conflict by asking this Court to review the Board's decisions.[5]

The Issues on Appeal. Before this Court, the lines of battle have been drawn with admirable clarity and good sense. Both sides have declined to assume certain exposed legal positions where they would quickly fall prey to the enemy's fire. Thus, respondents concede that the five accidents would not have been covered by the pre-1972 Act. Similarly, petitioners concede that the 1972 Amendments have broadened the Act's scope to include *some* shoreside injuries. The issue which divides the two camps

3. New Section 919(d) provides that evidentiary hearings shall be held before hearing examiners. The administrative regulations relating to the Amendments make it clear that such hearing examiners are to be Administrative Law Judges. *See* 20 C.F.R. § 702.332 (1975).

4. Pursuant to Section 921(b)(3) of the new Act, the Benefits Review Board is authorized to hear appeals by any party in interest from the Administrative Law Judge's orders. The Board must base its decision upon the hearing record and is bound by a "substantial evidence" standard in its review of findings of fact. *Id.*

5. Jurisdiction over these appeals is conferred upon us by Section 921(c) of the new Act. Thereunder, a party aggrieved by a final order of the Board may obtain review of that order in the Court of Appeals for the federal judicial circuit in which the employee's injury occurred.

is, of course, whether the Act was expanded far enough to reach *these* five injuries. We hold that the Board properly awarded benefits to two workers who were handling maritime cargo on shore, as well as to a carpenter who was fabricating parts for a new ship. However, the Board misconstrued the Act in extending coverage to the other two respondents, a shipboard worker who stumbled in front of his employer's office a mile from the ship, and an employee who was helping to tear down a shed in a disused marine repair facility.

Not content with merely jousting over the scope of the revised Act, three of the petitioners have broken ranks to seek out other *casus belli*. The petitioners in the *Halter Marine* case argue that the Act is unconstitutional if it covers injuries to shipbuilders on shore. In *Pfeiffer*, we are told that the Board violated the petitioners' right to due process by the method in which it awarded a fee to the claimant's attorney. The *Ayers Steamship* petitioners enter the lists with a plan to split the enemy forces; they claim that the Director is not a proper respondent in these appeals. As will hereinafter appear, we reject all of these additional contentions.

II

SCOPE OF THE 1972 AMENDMENTS

Of the many changes which Congress made in the Act in 1972, we are here concerned with only one: the extension of the Act's coverage inland to reach certain maritime-related injuries. Under the prior Act, coverage was overwhelmingly situs-oriented. As a general rule, an employee's injury was compensable if it occurred "upon the navigable waters of the United States (including any dry

dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . ."[6] Interpretation of this provision was immensely complicated by a judicially created doctrine under which some "maritime but local" injuries could be covered by both state and federal compensation schemes. *See, e.g., Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 82 S.Ct. 1196, 8 L.Ed.2d 368 (1962); *Davis v. Department of Labor*, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246 (1942). However, the Supreme Court made it clear that, whatever the exact parameters of the "maritime but local" doctrine, the federal Act would generally be confined to injuries occurring over the waters. Thus, in *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 90 S.Ct. 347, 24 L.Ed.2d 371 (1969), the Court held that the Act did not cover injuries to longshoremen who were working on a pier permanently affixed to the shore. Coverage was denied despite the fact that the workers had been injured while loading and unloading ships, an employment as maritime in nature as any land-based employment could be.[7] The inequities of this "water's edge" division between covered and noncovered work were a major factor behind the decision to expand the scope of the Act.[8]

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6. See former 33 U.S.C. § 903(a). There were certain exemptions from coverage, all of which have been carried over into the new Act. See *id, as amended*, § 903(a)(1) (masters and crew members; persons engaged by masters to service vessels under eighteen tons net); *id.* § 903(a)(2) (government employees); *id.* § 903(b) (injuries caused solely by the employee's intoxication or willful conduct).

7. Further underscoring the maritime context of these injuries was the fact that the injuries were caused by ships' cranes which had swung out of control. 396 U.S. at 213-14, 90 S.Ct. 347.

8. *See* H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News* at 4707.

[1] Two of the Act's new sections are pertinent to the present appeals.[9] The first of these defines the status which the affected employee must occupy to bring his injury within the Act's coverage:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker . . . 33 U.S.C. § 902(3).

The other provision describes the situs where a covered injury must occur:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading unloading, repairing, or building a vessel). *Id.* § 903(a).

From these statutes, the general thrust of the new Act's coverage is clear. Congress has replaced the old "water's

9. None of the employers denies that it is an "employer" within the meaning of new Section 902(4):

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In any event, it is clear that this section requires merely that an employer have at least one employee engaged in "maritime employment" (the requirement of new Section 902(3)'s definition of an "employee") on the situs defined in new Section 903(a). Thus, if a claimant can satisfy Sections 902(3) and 903(a), his employer is automatically brought within Section 902(4).

edge" analysis with a two-part test which requires (1) that the claimant have been engaged in "maritime employment" and (2) that the injury have taken place upon the situs specified in the Act.

[2, 3] The Act's definition of "maritime employment" is the focus of most of the legal controversy which rages in the parties' voluminous briefs. Unfortunately, much of this learned debate is of little relevance, if any, to the cases now before this Court. Counsel have drawn our attention to a host of pre-1972 decisions which discussed the meaning of the term "maritime employment" as used in the former Act. *See, e.g., Pennsylvania R.R. v. O'Rourke,* 344 U.S. 334, 73 S.Ct. 302, 97 L.Ed. 367 (1953); *Nalco Chemical Corp. v. Shea,* 419 F.2d 572 (5th Cir. 1969). Under the old Act, as under the present one, an employer was liable if he had one or more employees engaged in "maritime employment".[10] However, judicial constructions of the pre-1972 Act were necessarily limited by the "water's edge" approach of that statute.[11] For this reason, these older cases simply do not speak to the issue of what land-based employment is sufficiently "maritime" to be covered by the new Act.[12] Fortunately,

10. Compare old 33 U.S.C. § 902(4) with new 33 U.S.C. § 902(4). As we have indicated, *supra* note 9, the only way to read the new Act consistently is to give the words "maritime employment" in new Section 902(4) the same meaning as in new Section 902(3).

11. Not only, as noted was the "water's edge" doctrine applied to the situs of the claimant's injury, but the "maritime employment" of the employer's workers was required to take place "upon the navigable waters of the United States (including any dry dock)". See old 33 U.S.C. § 902(4).

12. The commendable diligence of counsel has uncovered some scattered dicta which might be read as suggesting the general nature of "maritime" work. *See, e. g., Pennsylvania R. R. v. O'Rourke, supra*

Congress itself has answered that question. The terms of the statute allow coverage for an injured employee who was working as a longshoreman, a ship repairman, a shipbuilder, or a shipbreaker.[13] The legislative history tells us that an injured employee will be covered if he was "engaged in loading, unloading, repairing, or building a vessel,"[14] but will not be covered merely because he was injured in the area defined by new Section 903(a).[15] In light of these indicia of Congressional intent, we must agree with the Court of Appeals for the Ninth Circuit that the new Act requires such a claimant to have been engaged in the work of loading, etc. *at the time of the injury. Weyerhaeuser Co. v. Gilmore,* 528 F.2d 957, 960 (9th Cir. 1975). We therefore reject respondents' contention that an employee's general job classification (such as "longshoreman" or "ship repairman") will bring him within the Act's coverage regardless of the nature of the work which he was performing when he was injured.[16] In its

344 U.S. at 339-40, 73 S.Ct. 302. These occasional pronouncements by the courts have, at best, only the most tenuous connection with the 1972 Amendment's extension of coverage to shoreside injuries. In comparison with the statutory language itself and the legislative history, the timeworn dicta which are urged upon us are entitled to little weight. Also, we note that none of the instant appeals involves an injury which occurred over the waters. Therefore, we need not, and do not, decide if the new Act made any changes in the coverage of such injuries.

13. 33 U.S.C. § 902(3).

14. In light of the statutory language, we regard the omission of shipbreaking from this passage as inadvertent.

15. "The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." H.R. No. 92-1441, 1972 *U.S. Code Congressional & Administrative News,* at 4708.

16. For the same reason we also cannot accept the notion that the official name of an employee's union or the language of a union's

reports, Congress has also indicated the extent to which coverage should be granted to persons who are not themselves loading, unloading, repairing, building, or breaking a vessel but who are nevertheless performing closely related functions. Thus, the House Report states that a checker would be performing covered work if he was "*directly involved* in the loading or unloading functions . . .".[17] Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.[18]

[4, 5] We specifically reject a theory which petitioners in the *Pfeiffer* and *Ayers Steamship* cases advance as the proper rule for cargo handling operations. They claim that the Act's coverage depends upon whether cargo has reached its shoreside "point of rest", as that term is used in the maritime industry.[19] To these petitioners, men who

jurisdictional agreement is dispositive of the issue of coverage. It is the employee's work at the time of the injury which controls.

17. *Id.* (Emphasis supplied.) The same report also states that clerical employees who do not "participate in the loading, or unloading of cargo" would not be covered by the new Act. *Id.*

18. *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 Journal of Maritime Law and Commerce 1, 10 (1974). By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building, or breaking, and which are not "directly involved" with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

19. The Federal Maritime Commission has defined the "point of rest" as follows:

are handling cargo on its way to a vessel are not covered by the Act until that cargo reaches its last marshaling area prior to being taken on board a ship. Similarly, under this theory men who are unloading cargo from ships are performing covered work only until they reach the first marshaling area for cargo on shore. We are unable to find any support for such a hypertechnical construction of the 1972 Amendments.[20] In our view if Congress had wished to adopt the "point of rest" as the test for coverage, it would have made that intention clear. As it is, the "point of rest" analysis is to be found neither in the statute itself nor in the legislative history. The closest approach to such a test appears in the following passage from the House Report:

> To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area . . . [E]mployees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered . . . H.R. No. 92—1441, 1972 *U.S. Code Congressional & Administrative News,* at 4708.

For the purpose of this section, "point of rest" shall be defined as that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading. 46 C.F.R. § 533.6(c) (1975).

20. A narrowly technical construction of the Longshoremen's and Harbor Workers' Compensation Act has traditionally been disfavored. *See, e.g., Luckenback* S.S. Co. v. Norton, 106 F.2d 137, 138 (3d Cir. 1939).

In our opinion, these remarks establish no more than that workers who bring cargo to a storage area from on board ship are covered, while those persons (generally truckers or railroad personnel) who merely receive cargo and transport it inland are not covered. The House Committee in this passage did not even mention those employees who handle cargo between the first holding area and the cargo's departure via land transportation. It is precisely the treatment of this intermediate group of workers with which we are here concerned, and this passage is totally silent as to them. Elsewhere, as we have seen, the Committee indicated that employees who are directly involved in loading or unloading will be covered by the new Act. In the absence of explicit language which would establish a "point of rest" dividing line for shoreside cargo handlers, we will apply this general test to them as well.[21]

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21. In deciding how to interpret the Amendments and their legislative history, we have remembered that this Act is to be liberally construed in favor of injured employees. *See Voris v. Eikel,* 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). In our view, this principle requires us to resolve doubts as to the new Act's coverage in favor of a particular group of workers such as cargo handlers landward of the "point of rest".

Brief mention should also be made of the House Committee's announced intention "to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity", H.R. No. 92-1441, *supra,* at 4708. We agree that here the Committee was speaking of one inequity of the old "water's edge" approach, under which cargo handlers would walk in and out of coverage as they moved between ship and shore. However, we see no reason to treat this statement as a comprehensive description of the new Act's coverage, with the result that only those workers who spend part of their days upon the waters would be covered. In this passage, the Committee was merely addressing itself to one anomaly which it wished to eliminate. The same paragraph clearly states that checkers would be covered by the new Act, and the Committee gave no indication that coverage would depend on whether the checkers went on board ship. The test, rather, was to be whether they were "directly involved in the loading or unloading functions". *Id.*

[6] Our interpretation of the new situs provision follows the same general lines as our construction of Section 902(3). Just as we choose to ignore the labels which an employer or a union has bestowed upon an employee, and instead rely upon the employee's work function at the time of the injury, likewise we will look past an area's formal nomenclature and examine the facts to see if the situs is one "customarily used by an employer in loading, unloading, repairing or building a vessel." The clear statutory scheme is to cover employees who are injured while performing certain types of work in an area which is customarily used for such work. Whether or not an employer or local custom has decided to designate an area as a "terminal", for example, is not dispositive of the situs issue. We will require that a putative situs actually be used for loading, unloading, or one of the other functions specified in the Act. As with the "maritime employment" test, we also interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

III

THE COVERAGE ISSUE IN THESE APPEALS

[7-9] With the general tests for the amended Act's coverage in mind, we now turn to the specific facts of each of the present cases. In deciding each appeal, we must remember that the Act is to be liberally construed in favor of injured workers, *see Voris v. Eikel,* 346 U.S. 328, 333, 74 S.Ct. 88, 98 L.Ed. 5 (1953). We are also bound by a statutory presumption that an individual claim

comes within the Act's coverage. 33 U.S.C. § 290(a). Finally, we will not set aside an award made by the Benefits Review Board so long as it is supported by substantial evidence on the record considered as a whole, and so long as there is a reasonable legal basis for the Board's conclusion. *See O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U.S. 504, 508, 71 S.Ct. 470, 95 L.Ed. 403 (1951); *Cardillo v. Liberty Mutual Ins. Co.,* 330 U.S. 469, 478-79, 67 S.Ct. 801, 91 L.Ed. 1028 (1947).[22]

[10] A. *No. 75-1659.* Herbert Perdue was employed by Jacksonville Shipyards, Inc., as a shipfitter. On February 2, 1973, he performed repair work for a twelve-hour shift (7:00 a.m. to 7:00 p.m.) aboard an aircraft carrier which was berthed at the Mayport Naval Station in Jacksonville, Florida. At the end of the working day, Perdue took a bus to an office which his employer maintained approximately one mile from the carrier. The bus was provided by Perdue's employer, and the office was the place where Perdue had to "punch out" on a time clock before and after each shift. While alighting from the bus near the office, Perdue stumbled and injured his left knee in a fall upon the pavement. In our view, the Board should have sustained the Administrative Law Judge's determination that Perdue was not injured on a situs defined by new Section 903(a). There is literally nothing in the record to support a conclusion that the employer's office was on the navigable waters or in an "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." The vessel

22. Although these cases were decided under the old Act, which provided for administrative adjudication by a deputy commissioner and for judicial review by a United States District Court, petitioners have offered no reason why the standard of review should be different under the present Act.

upon which Perdue was working was a mile away, and the "punch out" office was a purely clerical and administrative post separated from the waters by other facilities which likewise were not used for loading, unloading, ship repair, or shipbuilding.[23] Under no reasonable construction of the Act did this area either "adjoin" the waters or carry out any of the functions specified in Section 903(a). We reject the argument that the new Act covers every point in a large marine facility where a ship repairman might go at his employer's direction. In the words of the Administrative Law Judge below, the locus of this injury had "nothing to do with loading, unloading, building or repairing vessels" (Appendix at 19). Therefore we must reverse the Board's determination that Perdue is entitled to compensation under the new Act.

[11] B. *No. 75-2833.* Charles W. Skipper was another employee of Jacksonville Shipyards, Inc. For many years, he had been primarily engaged in ship repair work as a welder and burner. On the morning of February 8, 1974, Skipper reported for work as usual. However, instead of being assigned to his normal duties as a ship repairman, he was sent across the St. John's River to a disused marine facility called the Southside Yard. There, he was to assist in tearing down a building which had formerly housed a fabrication shop. The purpose of dismantling this structure was to salvage some steel for use in constructing a plant which would manufacture sandblasting equipment. The activities of Jacksonville Shipyards, Inc. are quite diversified, and the contemplated plant was a new business venture. Skipper himself had previously from time to time been assigned work, such as this salvage operation, which

23. The parties have stipulated that the nearest body of water was 500 yards away from the office.

did not involve ship repair. On the day in question, Skipper was injured when some beams fell from the structure during the dismantling process and several steel fragments struck his forehead. At the time of the injury, all of the shops in the Southside Yard were closed, and no repair or fabrication work was being carried out there. Occasionally, ships would still be tied up at the pier in the Southside Yard, and repairmen or other workers would be sent from the employer's active facilities to work on these ships. However, such work would have no relationship to the various disused facilities in the Southside Yard, including the former fabrication shop in question, which was located between one hundred fifty and two hundred feet from the water. On these facts, we perceive no basis for the conclusion below that Skipper's injury is compensable under the new Act. Under no reasonable view was Skipper performing ship repair work at the time of his injury, nor was he carrying out any other of the types of work which the statute specifies as "maritime employment". We further hold that this salvage gang was not engaged in any work sufficiently similar to the statutory categories to be seen as a type of shoreside employment which was fairly within Congress' intent despite not being named in the 1972 Amendments. As we have already indicated, we refuse to attach controlling weight to an employee's regular job classification. Therefore, we will not consider Skipper a "ship repairman" under Section 902(3) merely because he normally performed ship repair work. We look only to his duties at the time of the injury, and these were decidedly not within the contemplation of the statute.

[12] It is equally clear that Skipper was not injured on a situs as defined in new Section 903(a). We have

held that under Section 903(a) a covered situs must be "customarily used by an employer in loading, unloading, repairing, or building a vessel" *as of the time of the injury*. In this case, the Southside Yard shops had been inactive for approximately a year when Skipper was injured. No repair work or any other work specified by the statute was being performed in these buildings. Therefore, we must conclude that the former shops had lost their status as ship repair or shipbuilding facilities, and that Skipper was not injured on a Section 903(a) situs.

Because we reverse the administrative finding of coverage under the Act, we need not reach the other issues discussed by the parties, such as the propriety of the award which Skipper received for a facial scar and the various requests which the claimant's lawyers have made for attorney's fees.

[13] C. *No. 75-2289*. In this case, the parties agree that the situs of the injury was within the contemplation of new Section 903(a), and the only dispute is whether the claimant was performing covered work. On April 12, 1973, Diverson Ford was injured at the port of Beaumont, Texas, while helping to secure a military vehicle to a railway flat car in preparation for its transportation inland. The vehicle in question had arrived either two or seventeen days prior to the date of the accident. Since then, it had remained in the immediate waterfront area. On the day before the injury, a gantry crane at the water's edge had lifted the vehicles onto the flat cars. Ford's work of fastening the vehicles to the flat cars was therefore the last step in transferring this cargo from sea to land transportation. On the other hand, the vehicles were not moved directly from the ship to the flat cars but instead were taken first to a storage area. There is no dispute, then,

that the "point of rest" for these vehicles had intervened since their arrival in port. However, we have today chosen not to adopt the "point of rest" theory of coverage for shoreside cargo handlers. In addition to the general reasons which we have already given for our conclusion, we cannot overlook the injustices which the proposed test would create in a case like this one. Petitioners apparently concede that Ford would be covered if his work were part of a continuous operation which began with the cargo's departure from a ship's hold. As respondents correctly point out, we are being asked to deny coverage purely because of a discontinuity in time created by the cargo's having been stored for a while along the shore. In contrast, under the test which we have adopted a shoreside worker like Ford would be covered if he was directly involved in "longshoring operations" such as unloading a ship. The work which Ford was performing was evidently an integral part of the process of moving maritime cargo from a ship to land transportation. Accordingly, we perceive an ample basis for the Board's determination that Ford was performing covered work, and we therefore affirm that decision.[24]

[14] D. *No. 75-2317*. On July 30, 1973, John L. Nulty was employed as a carpenter at a shipyard in Moss Point, Mississippi. At the time of his injury, Nulty was building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned. The ship was berthed about 300 feet from the

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24. Petitioners' briefs are rich in references to the title of Ford's union (which was the "warehousemen's" rather than the "longshoremen's" union) and to the jurisdictional agreement between the two unions. As we have already indicated, we do not regard such matters as dispositive; instead, we look to the duties which a claimant was performing at the time of his injury.

fabrication shop where Nulty was working. The part which Nulty was fabricating was designed to hold a spare wheel on board the new ship. Most of Nulty's work was performed in the shop, although at times he would go on board a vessel to take measurements, or to install or repair some woodwork. The parties agree that a fellow employer known as a "shipfitter" would have picked up and installed the item which Nulty was building when he was injured. Under these facts, the Administrative Law Judge and the Benefits Review Board found that Nulty was working as a "shipbuilder" at the time of his injury and thus satisfied Section 902(3)'s definition of covered work. In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation. Under the test which we have adopted, then, Nulty is entitled to compensation under the new Act. We accordingly affirm the Board's finding of coverage.

[15] E. *No. 75-4112*. On May 2, 1973, Will Bryant was injured while working as a "cotton header" in a warehouse immediately adjacent to a pier in Galveston, Texas. At the port of Galveston, loads of cotton are first deposited at various shoreside warehouses by the inland shippers. The cotton is then placed upon dray wagons and taken to pier warehouses such as the one where Bryant was injured. The work performed by Bryant and other "cotton headers" is to unload the bales of cotton and stack them in pier warehouses. Two local unions, known to many as "cotton header's" and "longshoremen's" locals, have strictly divided waterfront operations between them. Generally, the cotton remains in these warehouses until other employees from the "longshoremen's" union take it on board ship. This storage period may last from less than one day to several weeks, although the average

interval is about one week. At times, the cotton will be moved from one pier warehouse to another before being taken to a ship. In such cases, dray wagons are again used to carry the cotton, and "cotton headers" unload these wagons at the receiving warehouse. Occasionally, the cotton is moved directly from a dray wagon to a ship, in which event the work is performed solely by "longshoremen". The cotton which Bryant was handling at the time of his injury remained in the same warehouse for five days before "longshoremen" arrived to take the cargo aboard a vessel. On these facts, we affirm the Board's conclusion that the injury sustained by Bryant is within the Act's coverage. The situs was a pier-side warehouse in which cotton is stored temporarily before being taken on board ships. Usually, the cargo is taken directly from the warehouse to a ship. It is clear that Bryant was working on a waterfront area "customarily used by an employer in loading . . . a vessel", and that therefore the requirements of Section 903(a) are met. We also will not set aside the Board's determination that Bryant was performing the work of an "employee" as defined in Section 902(3). We have already noted the established principle of liberal construction of this Act, and the statutory presumption that a claim is within the Act's coverage. Also, we are bound to respect the Board's conclusions if they are supported by the record and if they have a reasonable legal basis. In view of the limited nature of our review, we cannot say that the Board erred in defining Bryant's work status. As we here reiterate, we reject the notion that a "point of rest" such as the pier-side warehouse in this case marks the division between covered and uncovered work. We have no doubt that Bryant would be directly involved in "longshoring operations" if, instead

of setting the cargo down, he had handed it to a "longshoreman" for immediate loading on board a ship. The brief discontinuity in time created by the cotton's temporary storage did not alter the essential nature of Bryant's work, which was an integral part of the ongoing process of moving cargo between land transportation and a ship. Clearly, there is adequate support for a conclusion that Bryant was directly involved in "longshoring operations" and therefore falls within the terms of Section 902(3). Thus, we affirm the Board's decision that the injury in this case is covered by the new Act.[25]

IV

A CONSTITUTIONAL QUESTION

[16, 17] It is earnestly argued by Halter Marine Fabricators, Inc., and its insurance carrier that the new Act is unconstitutional insofar as it extends coverage to shipbuilding employees who are injured on land. We are reminded that traditionally a contract to build a ship has not been considered to be within the admiralty jurisdiction,[26] and that admiralty has traditionally included only those torts which occur upon the waters.[27] In the *Halter Marine* case, the employee was injured while working on land in furtherance of a shipbuilding operation. Therefore, we are told, Congress has exceeded the fixed boundaries

25. Once again, we refuse to base our decision upon the designations of the two waterfront unions as "cotton header's" and "longshoremen's" or upon the terms of their jurisdictional agreements. Compare note 24, *supra*.

26. *See, e.g., Thames Towboat Co. v. The Francis McDonald,* 254 U.S. 242, 243, 41 S.Ct. 65, 65 L.Ed. 245 (1920).

27. *See, e.g., Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972).

of admiralty jurisdiction by covering work under a non-maritime contract which is performed on a situs outside the scope of traditional tort jurisdiction. In essence, the argument is that the sum of traditional admiralty tort and contract jurisdiction defines the absolute limits within which Congress may legislate under the Admiralty Clause.[28] We disagree with this proposition. No authority supports the notion that, in enacting a uniform compensation scheme for waterfront employees, Congress must find a "contract" or "tort" peg upon which to hang its legislation. The true analysis to be applied to such statutes is quite different. It must begin with the longstanding judicial recognition of Congress' broad powers to expand the reach of admiralty jurisdiction. Contrary to the impression created by petitioners' briefs, such judicially authorized expansion has often been geographical in nature. *See, e.g., The Genesee Chief,* 12 How. 443, 13 L.Ed. 1058 (1851), *overruling The Thomas Jefferson,* 10 Wheat. 428, 6 L.Ed. 358 (1825) (abandoning former limitation of admiralty jurisdiction to the tidewaters). The cases which approve the many changes which Congress has made in admiralty jurisdiction are replete with statements such as the following:

> The authority of the Congress to enact legislation of this nature [the Ship Mortgage Act, 46 U.S.C. §§ 911, *et seq.*] was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our

28. Art. III, Section 2 of the Constitution extends the federal judicial power "to all Cases of admiralty and maritime jurisdiction . . ." This clause has always been construed as empowering Congress to legislate in maritime matters. *See, e.g., Romero v. International Terminal Operating Co.,* 358 U.S. 354, 361, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

> experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned . . . *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52, 55 S.Ct. 31, 41, 79 L.Ed. 176 (1934).

The Supreme Court has also consistently followed the view that this Congressional power "permits of the exercise of a wide discretion". *Panama R.R. v. Johnson*, 264 U.S. 375, 386, 44 S.Ct. 391, 394, 68 L.Ed. 748 (1924). Our conclusion is that, in the exercise of its discretion, Congress could properly determine that "new conceptions of maritime concerns" justified the extension of compensation coverage to workers in the immediate waterfront area who participate in an ongoing shipbuilding operation. As the legislative history makes clear, Congress was concerned that under the former Act maritime workers were covered over the waters but not covered while performing similar or related work on shore. The inequities of the pre-1972 Act in this regard are obvious, and we feel that this concern was a legitimate reason for Congress to exercise its discretion. We also feel that this concern was a "maritime" one within the meaning of the Admiralty Clause. We have already indicated that, in defining "maritime" concerns, we will not be limited by the rules which apply to tort and contract litigation. In the present case, we are not considering whether Congress would authorize suits upon shipbuilding contracts or whether land-based torts could be made actionable by an admiralty statute.[29] We deal only with the case before us, and in our view Congress could reasonably have felt that shipbuilding employees beside the navigable waters were performing a sufficiently maritime function to be covered

29. *See* 1A *Benedict on Admiralty* § 94, at 5-15 (6th ed. 1973).

by a revamped harbor workers' compensation statute. We therefore cannot conclude that Congress exceeded its broad discretion by extending coverage to such work.[30]

V

DIRECTOR A PROPER RESPONDENT

[18] This issue is before the Court in rather an odd fashion. In their main brief on appeal, the *Ayers Steamship* petitioners allege that the Director of the Office of Workers' Compensation Programs, United States Department of Labor, is not a proper respondent in this Court, although he could appear as *amicus curiae*. We decline to consider the merits of this contention. First, we note that petitioners have never moved to dismiss the Director as a respondent. In our view, the relief which petitioners seek—dismissal of the Director as a party and addition of him as *amicus Curiae*—is properly requested by a motion pursuant to Rule 27 of the Federal Rules of Appellate Procedure. Under that Rule, a motion is the appropriate vehicle for making "an application for an order or other relief", a category which clearly includes the request which petitioners have made for the first time in their brief. Furthermore, even assuming that petitioners have adequately raised this point, we cannot overlook the fact that in the two *Jacksonville Shipyards* cases another panel of this Court has granted motions by the Director to be added as a party respondent. These legal determinations that the Director may properly appear as a respondent must be respected by this Court. As a general rule, one panel can-

30. Because of our disposition of this issue, we need not reach the questions of whether the 1972 Amendments were an exercise of Congress' power under the Commerce Clause as well as under the Admiralty Clause.

not overrule the precedents set by another panel, absent some intervening factor such as a new controlling decision of the Supreme Court. *See Davis v. Estelle,* 529 F.2d 437, 441 (5th Cir. 1976). No such factor is present in this case, and we will therefore allow the Director to remain before this Court as a respondent.

VI

DUE PROCESS

[19, 20] In the *Pfeiffer* case, the Benefits Review Board awarded an attorney's fee to counsel for the successful claimant. The fee covered only the work which was performed before the Board, and the manner of its award was as follows. Pursuant to the applicable regulation,[31] counsel presented his request for an attorney's fee, supported by a complete statement of the services which had been performed. Finding a fee of $1,000 to be "fair and reasonable for the work done in connection with these appeals", the Board approved an award in that amount, remanding the case to the Administrative Law Judge for determination of a fee for counsel's services at that level. Petitioners opposed the award, arguing that counsel had not "properly proved" the reasonableness of the fee and that petitioners should have an opportunity to offer evidence and to cross-examine counsel on the amount of his fee. The evidentiary hearing which they requested was alleged to be a requirement of the Fifth Amendment's Due Process Clause. The board rejected these arguments, and so do we. Government officials are, of course, required to minimize the risks of error and unfairness in

31. 20 C.F.R. § 702.132 (1975). The statutory basis for this regulation is 33 U.S.C. §§ 928(a) & (c), *as amended.*

the procedures by which one is deprived of life, liberty, or property. *See, e.g., Goss v. Lopez,* 419 U.S. 565, 581, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600, 609-10, 618, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974). We feel that these risks were adequately minimized by the procedures which the Board followed. The Board was clearly able to evaluate the services which counsel performed before it. It was the Board which read counsel's briefs and observed his representation of the claimant in the administrative appeal. Thus, the fee which the Board granted was carefully limited to those services of which it had first-hand knowledge. Especially in view of the extremely generalized nature of petitioners' attack upon the fee's reasonableness, we cannot say that disposing of petitioners' objections without an evidentiary hearing was a violation of the Due Process Clause.

VII

CONCLUSION

For the foregoing reasons, the decisions of the Benefits Review Board in Nos. 75-1659 and 75-2833 are REVERSED. The Board's decisions in Nos. 75-2289, 75-2317 and 75-4112 are AFFIRMED in all respects.

APPENDIX D

CARGILL, INC., and State Accident Insurance Fund,
Petitioner,

v.

KENNETH E. POWELL, and Director, Office
of Worker's Compensation Programs,
Respondent.

NO. 75-2655.

UNITED STATES COURT OF APPEALS,
Ninth Circuit.

Nov. 17, 1977.

Rehearing and Rehearing En Banc

Feb. 7, 1978.

573 F.2d 561

On petition for review of the Benefits Review Board, which decided that injury suffered by claimant in course of his employment was within coverage of the Longshoremen's and Harbor Workers' Compensation Act, the Court of Appeals, Eugene A. Wright, Circuit Judge, held that claimant, whose injury was sustained in terminal area that at least in part was used in loading and unloading ships but who was employed by grain merchant to unload railroad cars transporting grain from inland points and who had not once during seven months he had performed such duties been called on to assist directly in

loading and unloading of any ship, was not covered by the Act.

Petition granted and case remanded.

J. Blaine Anderson, J., filed dissenting opinion.

On Petition for Review of the Benefits Review Board.

Before LUMBARD*, WRIGHT and ANDERSON, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

This petition for review is brought by Cargill, Inc., and its workers' compensation insurer, the State Accident Insurance Fund, pursuant to 33 U.S.C. § 921(c) of the Longshoremen's and Harbor Workers' Compensation Act [LHWCA], 33 U.S.C. § 901, *et seq.*, seeking reversal of a decision of the Benefits Review Board. The Board's decision held that an injury suffered by Kenneth E. Powell in the course of his employment with Cargill was within the coverage of the LHWCA and thereby reversed the decision of the administrative law judge who had denied Powell's claim.[1]

In early 1973 Powell was hired from the union hall, jointly operated by Local 8 of the International Longshoremen's and Warehousemen's Union and the employers in the Port of Portland, to work for Cargill at its grain handling facilities at Terminal 4, a public dock facility owned by the Port and situated on the Willamette River.

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* The Honorable J. Edward Lumbard, Senior United States Circuit Judge, Second Circuit, sitting by designation.

1. The Board's decision is reported at 1 BRBS 503.

The longshoremen employed by Cargill were hired as "key men" which meant that they could perform any of the several tasks involved in the operation and maintenance of all grain handling equipment at the facility. Their work did not include work aboard the ships.

The employer, Cargill, Inc., is in the business of buying and selling grain, most of which is exported overseas. The grain purchased by Cargill is received at Terminal 4 by rail, truck and barge. Once received, the grain is unloaded and delivered by conveyor belts to Cargill's main elevator for weighing and then to bins where it is stored. When a ship is ready for loading the grain is conveyed again to the scales, and then to the ship. The actual distribution of grain into the ship's hold is done by independent stevedoring companies. If a ship was being loaded as grain was being received, the grain would be conveyed directly through the scales to the ship.

On the day of his injury, July 22, 1973, Powell had been continuously employed by Cargill for about seven months. During most of those seven months, and on the day of his injury, he worked as a "tipper" switchman. The "tipper" is a device used to assist in the unloading of railroad cars. The "tipper" would not accept certain railroad gondola cars and when such cars arrived, Powell would assist in the unloading of them. He injured his back while attempting to open one of the cars.

The sole issue before this court is whether Powell's claim is within the coverage of the LHWCA, as amended in 1972.

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977), goes a long way to defining to whom the LHWCA applies, but there

remains a gray area where maritime activity blends into the nonmaritime. This case lies in that murky area.

In *Northeast Marine Terminal,* the Supreme Court was confronted with the question of coverage under the LHWCA of injuries sustained by two workmen, Carmelo Blundo and Ralph Caputo. On the day of his injury, Blundo was assigned as a "checker" whose responsibility was to check and record cargo as it was loaded onto or unloaded from vessels, barges, or containers. A container is a large metal box capable of carrying large amounts of cargo destined for one or more consignees. When a container carried goods for several different consignees, it would have to be unloaded or "stripped" and the goods would be sorted. Blundo, while recording cargo stripped from a container, was injured when he slipped on some ice on the pier. On the day of his injury Caputo was helping consignee's truckmen load their trucks with cargo. Caputo sustained his injury while rolling a dolly full of cargo into the consignee's truck.

The Supreme Court began its analysis with an extensive review of the legislative history of the LHWCA in general and of the 1972 amendments in particular. According to the Court, Congress, in amending the Act in 1972, had two concerns in mind: (1) "to adapt the LHWCA to modern cargo handling techniques, . . . specifically . . . the impact of containerization," and (2) "to provide continuous coverage through out their employment to these amphibious workers who, without the amendments, would be covered for only part of their activity." At 273, 97 S.Ct. at 2362.

The Supreme Court found that Congress, by broadening the definition of the geographical boundaries of cover-

age and by amending the definition of the class of persons covered, "changed what had been essentially only a 'situs' test of eligibility for compensation to one looking to both the 'situs' of the injury and the 'status' of the injured." At 264-265, 97 S.Ct. at 2358. Applying this situs-status" test, the Court found that Blundo's and Caputo's injuries were sustained within the broadened geographical area of coverage and that their job assignments were within the modernized category of "longshoring operations."

Our task here is to determine the proper application of the "situs-status" test to the facts of this case, bearing in mind the dominant themes of the 1972 amendments. This undertaking is not a simple one since Powell's job, unlike the two jobs involved in *Northeast Marine Terminal,* does not neatly fit either of the two criteria that the Court recognized.

Turning first to the "situs" requirement, we believe there can be little doubt that Powell's injury was within the geographic boundaries of the employer's marine terminal. Powell's injury, like Caputo's, was sustained in the terminal area, which, at least in part, was used in loading and unloading ships. That is sufficient to satisfy the "situs" requirement, as defined by the Court in *Northeast Marine Terminal.*

[1, 2] We now turn to the more difficult question whether Powell has satisfied the "status" requirement. Powell might well have been occupationally classified as a longshoreman for seventeen years, but here we must look to his employment status at the time of the accident.[2]

2. Similarly, it is not relevant that Powell is a registered member of the International Longshoremen's and Warehousemen's Union, or that he worked in virtually all phases of the longshoring operation for every employer in the Port of Portland. We cannot concern ourselves with the entire span of a claimant's career.

As noted above, Powell was employed by a grain merchant to unload railroad cars transporting grain from inland points. He had worked in this position for about seven months at the time of the accident. After being unloaded, the grain was weighed, and then usually was stored for varying periods of time before being loaded aboard ship.[3]

The Supreme Court noted that "when Congress said it wanted to cover 'longshoremen' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations." At 273, 97 S.Ct. at 2362. The Court found that Caputo was such a person by focusing on the fact that he could have been assigned to any one of a number of tasks throughout *a single workday* and that to deny coverage for one task while including coverage for another "would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate." *Id.*

[3] In the past it might have been customary for Powell to hire himself out to employers on an irregular basis, and some of his work may have been indisputably maritime. At the time of the accident, however, Powell had been employed by the same employer performing the same duties for about seven months. Not once during that tenure was he called on to assist directly in the load-

3. It is also not relevant that a ship may have been in the process of being loaded by the stevedores at the time of the accident. Whether or not a ship was being loaded could have had no effect on the nature of Powell's duties. His responsibilities only involved unloading the grain from the rail cars to be conveyed to the scales. Whether the grain then went to storage bins, to ships, or to carriers for inland shipment was not a concern of Powell's. Indeed, this point serves to reinforce the view that Powell's duties involved only nonmaritime work.

ing or unloading of any ship, nor is there any evidence that such genuine maritime work was even contemplated. Powell's attention was directed to the unloading of rail cars as they arrived at the elevator. He had no involvement whatsoever with the loading and unloading of the ships themselves. His work was more oriented to the rails than to the sea.

The policy pointed to by the Supreme Court in *Northeast Marine Terminal* to explain Congress's extension of the Act to employees who spend a part of their workday in nonmaritime activity cannot support coverage for Powell. Having served seven months of continuous, nonmaritime employment, with no indication that termination of that employment was contemplated, Powell cannot now claim that he is subject to the "shifting and fortuitous coverage" in a single workday that concerned the Supreme Court in Northeast Marine Terminal.[4]

We grant the petition for review, and remand for reinstatement of the decision of the administrative law judge denying benefits to the employee.

J. BLAINE ANDERSON, dissenting:

In finding that Powell was not covered by the Act, the majority focuses upon his employment status at the time of the accident and concludes that his activities were "more oriented to the rails than to the sea." Believing

4. This is not to say that an employee whose duties shifted from the martitime to the nonmaritime over a period of time greater than a single workday is never covered by LHWCA. We only note that in *Northeast Marine Terminal, supra*, the Supreme Court focused on an employee whose duties shifted throughout a single working day. We do not decide whether an employee whose duties shifted every week, or every month, may still qualify under the Act. That determination must be left to development in future cases.

that Powell's status at the time of the accident was identical to Caputo's in the overall process of loading and unloading, although performed at different ends of the spectrum, I respectfully dissent.

It should be noted that in *Northeast Marine Terminal, supra,* the Supreme Court, by focusing on the fact that Caputo could have been assigned to any one of a number of "longshoring" tasks on the day of his injury, did not have to decide the issue before this panel, i.e., whether Caputo's specific unloading task was covered under the Act. However, in my opinion, the Court indicated that that part of Caputo's job would be covered, even if the other tasks performed were not indisputably longshoring operations.

First of all, the Court rejected the point of rest theory as too restrictive. From this it is clear that coverage, in the case of loading, is extended beyond the point where the stevedoring operation begins and the terminal operation ends. The Court also reiterated the only example of work, found in the legislative history that Congress intended to exclude—employees "whose responsibility is only to pick up stored cargo for further transshipment." At 275, n. 37, 97 S.Ct. at 2363. The Court found that this example did not refer to Caputo, but is limited to "workers such as the consignee's truck drivers Caputo was helping, whose presence at the pier or terminal is for the purpose of picking up cargo for further shipment by land transportation." At 274-275, n. 37, 97 S.Ct. at 2363. By analogy to Caputo's job, this example does not pertain to Powell. The purpose of Powell's presence at the terminal was not that of delivering cargo for further shipment by sea, but rather

to initiate the process whereby this delivered cargo was loaded onto a ship.[1] Powell's function was identical to Caputo's in the overall process of loading and unloading, with the only difference being that their jobs were performed at different ends of the spectrum.

I am also persuaded by the fact that the Supreme Court repeatedly noted that the Act should be liberally construed, both because the language "engaged in maritime employment" is broad, and because the Act is remedial legislation. The Court noted that this broad language "suggests that we should take an expansive view of the extended coverage" since "such a construction is appropriate for this remedial legislation." At ____, 97 S.Ct. at 2359. I believe that a liberal construction supports the Board's finding "that the claim-

1. The majority also finds that it is irrelevant that a ship may have been in the process of being loaded at the time of the accident. There was circumstantial evidence that at the time of Powell's injury, a ship was present and being loaded. Mr. Powell testified as follows:

"Q. Mr. Powell, do you know whether or not there was a vessel there at the time of your injury?

A. Well, I thought there was one there. I'm not sure. I'm not going to—I mean—.

Q. It doesn't make any difference to you?

A. As I say, at the time I thought there was a ship there because, if it wasn't there—I mean, the older guys would have been down there working the tipper and stuff like that, and like I say, I was towards the tail end of the layoff deal." (R.T. 34).

I also note that this evidence stands unrebutted by Cargill, even though it was within its power by its own records to demonstrate the reliability or unreliability of Powell's assertion. Accepting Powell's unrebutted version, though somewhat equivocal, I would conclude that some of his activities, like Caputo's in *Northeast Marine Terminal, infra*, were indisputably "longshoring operations," i.e., loading a ship even though his activity was confined to land. It was the beginning point of loading in the same sense that Caputo's activities were the ending point of unloading. To put it another way, could this ship have been loaded if no one had performed Powell's function?

ant's duties of unloading grain . . . was the beginning step of a longshoring operation in maritime employment." I believe that to hold otherwise would be to return to the "hop-scotch" effect that the 1972 amendments were designed to eliminate.

The Petition for Review should be denied.

APPENDIX E

Lawrence J. CONTI, Appellee,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

Simon S. SCARANO, Appellee,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

George M. FUNK, Appellee,
v.
NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

Nos. 76-2336 to 76-2338.

UNITED STATES COURT OF APPEALS,
Fourth Circuit.

Argued Oct. 3, 1977.

Decided Dec. 8, 1977.

566 F.2d 890.

In action to recover damages under the Federal Employers' Liability Act, an appeal was taken by railroad-employer from a judgment entered in favor of plaintiff by the United States District Court for the Eastern District of Virginia, at Norfolk, Richard B. Kellam, Chief Judge. The Court of Appeals, Field, Senior Circuit Judge, held that where the occupations of plaintiff rail-

road employees were not of a traditionally maritime nature but on the contrary were those traditionally associated with railroading, where their tasks and responsibilities with respect to unloading coal from hopper cars would have been the same at an inland terminal as they were at Lamberts Point on the Elizabeth River in Norfolk, Virginia, and where the sophisticated automation of the facilities at the latter terminal could not obscure the basic fact that, at the time of their injuries, plaintiffs were engaged in unloading a coal train, not loading a vessel, there was nothing in the amendments or legislative history of the Longshoremen's and Harbor Workers' Compensation Act to indicate that Congress, under the circumstances, intended to transfer the redress of such injured railroad workers from the Federal Employers' Liability Act to the Longshoremen's Act; that is, plaintiffs were not maritime employees under the Longshoremen's Act.

Affirmed.

Before BUTZNER, Circuit Judge, FIELD Senior Circuit Judge, and THOMSEN, Senior District Judge.*

FIELD, Senior Circuit Judge:

In each of these three cases the plaintiff filed an action in the district court to recover damages under the provisions of the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51, *et seq.* The defendant filed a motion to dismiss in each case, asserting that at the time of their respective injuries the plaintiffs were engaged in maritime

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* Honorable Roszel C. Thomsen, District of Maryland, sitting by designation.

employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901, *et seq.*, which provides their exclusive remedy. The district court denied the dismissal motions and the cases proceeded to trial and judgment. The only issue on these appeals is whether the district court properly concluded that the plaintiffs were not maritime employees under the LHWCA.

The facts are not disputed. The defendants, Norfolk and Western Railway Company (N&W), is a railroad carrier with its eastern termius at Lamberts Point on the Elizabeth River in Norfolk, Virginia. The transportation of coal is the largest single revenue source for the N&W, and the export coal is loaded on vessels at the Lamberts Point Yards and Piers which are operated by the N&W.

The export coal originates in the mines in Kentucky, Virginia, and West Virginia and is placed in hopper cars at the mines. The coal is brought to the eastern seaboard by trains usually consisting of some 275 loaded coal cars. Upon reaching the Norfolk terminal the cars are stored in the Portlock Yard and thereafter are moved to the classification yards at Lamberts Point. Upon orders of the yardmaster, the cars are moved from the classification yards to the Barney Yard by a "hump" crew to await loading aboard vessels at Pier 6. Cuts of loaded cars are placed on the 32 tracks of the Barney Yard all of which lead to Pier 6 and slope downhill in the direction of the pier. It is, of course, necessary that a brakeman in the Barney Yard set the brakes on each car to prevent it from rolling forward.

When a car is scheduled to go to the dumpers a brakeman uncouples it from the line of cars and releases the

brakes. Due to the slope of the tracks the car will ordinarily commence to roll freely. However, if the car fails to roll a brakeman will use a pinch bar or teaser to start it moving. The speed of the moving car toward the scale is controlled by a radar-operated retarder, and if the speed of the car exceeds four miles per hour an automatic braking system will cause it to slow down. The car then passes over scales which automatically record the weight, and it continues to roll toward the thawing chamber which is designed to emit heat sufficient to thaw any snow or ice that may be in the coal so that it will flow easily. The car then rolls to the Barney pit where it comes to a complete stop. At that point a brakeman positions the car automatically and operates the cut levers on the car to separate it from other cars in the pit area. Two cars are then shoved forward on parallel tracks to a position where a mechanical device called a Barney Yard "mule" pushes the cars up an incline to the dumpers. As the cars reach the dumpers they are picked up mechanically, turned upside down, and the coal falls into a hopper or receiving bin. The coal is then transported by an underground conveyor belt to the shiploaders on the pier where it is loaded into the hold of a ship by a telescopic arm on the shiploader.

After the coal has been dumped into the bin, the car is mechanically returned to an upright position and pushed forward down an incline by the car that has next come on to the dumper. The speed of the empty car is checked and its direction reversed by the upgrade of the track called the kickback. When the car reaches a point on the upgrade it comes to a stop and then commences to roll backwards. The car is then automatically

switched to another track and rolls down into the "Empty Car Yard." Yard crews of the N&W take the empty cars out of this yard and ultimately they are assembled into trains for the return trip to the coal fields.

During a normal operation some twenty brakemen are assigned to the Barney Yard, together with one to three car retarder operators, two yard foremen and two yard conductors. Brakemen who are assigned to work in the Barney Yard also work in various other yards in the Norfolk terminal and are governed by the same operating and safety rules as other brakemen, conductors and engineers in the N&W system. None of the brakemen ever have occasion to go to Pier 6 or aboard a ship, nor do they ever operate the dumper or loader. The deck foreman, certain clerical workers and motive power personnel are the only employees of the N&W who work on the pier or go aboard the ships.

CONTI

Conti was employed as a brakeman by the N&W, and on March 8, 1975, was working in the Barney Yard at a point where loaded cars were being brought into the yard by the "hump" crews. Conti was responsible for tying brakes, uncoupling levers, giving signals, inspecting cars, and starting cars on their way to the scales and dumpers. He had moved several loaded coal cars a short distance with a pinch bar and had then uncoupled the lead car and was using the pinch bar to start it forward. At that time the "hump" crew knocked a string of cars into the car which Conti was pinching, causing the bar to fly out and injure his leg.

SCARANO

Scarano was employed as a conductor-brakeman by the N&W and on January 22, 1975, was working in the Barney Yard, where he was engaged in pinching loaded coal cars toward the dumper. For some reason, a car at the dumper was not unloaded and Scarano was instructed to ride the loaded car from the dumper to the kickback and then back to the empty yard. Scarano rode the car to the empty yard where he braked it to a halt some 1,000 yards from Pier 6. He then left the car and was walking toward the brakemen's shack when he fell in an unlighted ditch and injured himself.

FUNK

Funk was employed by the N&W as a Barney Yard brakeman, and on April 23, 1975, was working at the south kickback which was outboard or seaward of the Pier 6 south dumper. It was his assignment at that time to make certain that the knuckles on the cars were closed after they had been dumped. Two loaded cars were being brought up to the dumper and when they hit the empty cars they became coupled. It was necessary to stop the shiploading operation until the two empty cars were pulled out from the dumper. Funk was attempting to pull the cars by use of a hook and winch, and while trying to hold the hook in place he injured his right hand.

Disposition of these appeals requires that we examine the area and occupational nature of the plaintiffs' activities at the time of their injuries in the light of the amendments of three sections of the LHWCA which were made in 1972. These sections, with the amendatory

language italicized, now provide in pertinent part as follows:

> LHWCA, § 2(3), 33 U.S.C. § 902(3):
>
> The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker,* but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> LHWCA, § 2(4), 33 U.S.C. § 902(4):
>
> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).*
>
> LHWCA, § 3(a), 33 U.S.C. § 903(a):
>
> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

We first had occasion to consider these amendments in *I. T. O. Corp. of Baltimore v. Ben. Rev. Bd., etc.*, 4

Cir., 529 F.2d 1080 (1975). In his opinion for the panel majority in that case Judge Winter, after an extensive review of the background and legislative history of the amendments, summarized them as follows:

> Sections 2 and 3 of the present Act establish a dual test for coverage. The situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have been engaged in "maritime employment," a concept which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to *broaden* the area in which an injury would be covered, and *narrow* the class of persons eligible according to job function. *Id.* 1083.

In searching for an effective "status" test to determine when an employee is "engaged in maritime employment" the panel majority in *I.T.O.* adopted the so-called "point of rest" theory. The panel's decision was modified to some degree by the court sitting en banc, 542 F.2d 903 (1976), and while certiorari was pending the Supreme Court handed down its decision in *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977).[1] Shortly thereafter the Court vacated our judgment in *I.T.O.* and remanded for further consideration in the light of *Northeast,* 432 U.S. 249, 97 S.Ct. 2348, 53 L.Ed.2d 320 (1977). The Court's decision in *Northeast* is, of course, the benchmark in our consideration of the present appeals.

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1. Consolidated with No. 76-454, *International Terminal Co., Inc. v. Blundo, et al.,* also on certiorari to the same court.

Blundo, one of the respondents in *Northeast,* had been employed for several years as a "checker" by a terminal company at its Brooklyn pier. As a checker Blundo was responsible for checking and recording cargo as it was loaded onto or unloaded from vessels, barges or containers. From day to day Blundo was assigned to work either on a ship or on shore. On the day of his injury he was checking cargo which was being removed from a container on the pier.

The other respondent, Caputo, was a member of a regular longshoring "gang" that worked for a stevedoring company. When his gang was not needed, Caputo went to a hiring hall and was hired by the day by other stevedoring companies or terminal operators who had work available. He had at times been hired to work as a member of a stevedore gang on ships at a pier in Brooklyn, and on other occasions had been hired by Northeast for work in its terminal operations at the same location. On the day of his injury Caputo had been hired by Northeast to perform "terminal labor," and was assigned to assist consignees' truckmen load their trucks with cargo which had been discharged from ships at the terminal. While so engaged Caputo was injured.

The Court had little difficulty in concluding that Blundo satisfied the status test. Noting the Congressional intent to adapt the LHWCA to modern cargo handling techniques, the Court stated that Blundo's task of checking items of cargo as they were unloaded from a container was "clearly an integral part of the unloading process as altered by the advent of containerization and was intended to be reached by the Amendments." 432 U.S. 271, 97 S.Ct. 2361.

With respect to Caputo, the Court observed that the Congressional desire to accommodate the Act to modern technology was irrelevant "since he was injured in the old-fashioned process of putting goods already unloaded from a ship or container into a delivery truck." *Id.* The Court recognized, however, that another objective of Congress was to achieve a uniform compensation system which "did not depend on the 'fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water'," *Id.* and, accordingly "extended the situs to encompass the waterfront areas where the overall loading and unloading process occurs." *Id.*

The Director of the Office of Workers' Compensation Programs had urged upon the Court the view that "maritime employment", as used in the Amendments, should include "all physical tasks performed on the waterfront, and particularly, those tasks necessary to transfer cargo between land and water transportation." *Id.,* 432 U.S. at 272, 97 S.Ct. at 2361. The Court, however, found it unnecessary to pass upon the validity of the Director's position, stating:

> It is clear, at a minimum, that when someone like Caputo performs such a task, he is to be covered. The Act focuses primarily on occupations—longshoreman, harbor worker, ship repairman, shipbuilder, shipbreaker. Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring op-

> erations and who, without the amendments, would be covered for only part of their activity. *Id.*, 432 U.S. at 273, 97 S.Ct. at 2362.

[1] To us the nub of the Court's decision is that an employee who is not engaged in "an integral part of the unloading process" will not fall within the coverage of the Act unless his occupation is of a traditional maritime nature. This was the construction placed upon the statutory language by the Ninth Circuit in *Weyerhauser Company v. Gilmore,* 528 F.2d 957, 961 (1976), *cert. denied* 429 U.S. 868, 97 S.Ct. 179, 50 L.Ed.2d 148 (1976):

> We hold that for an injured employee to be eligible for federal compensation under [the Act], his own work and employment, as distinguished from his employer's diversified operations, including maritime, must have a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters," with the further condition that the injury producing the disability occurred on navigable waters or adjoining areas as defined in § 903. (Citations omitted).

[2] It is clear that in the cases before us the occupations of the plaintiffs were not of a traditionally maritime nature, but on the contrary were those traditionally associated with railroading. Their tasks and responsibilities with respect to the unloading of the coal from the hopper cars would have been the same at an inland terminal as they were at Lamberts Point, and the sophisticated automation of the facilities at the latter terminal should not obscure the basic fact that the plaintiffs were engaged in unloading a coal train, not loading a vessel.

We find nothing in the Amendments or the legislative history to indicate that under these circumstances the Congress intended to transfer the redress of such injured railroad workers from the FELA to the Longshoremen's Act.

Since we agree with the district court that the plaintiffs were not engaged in maritime employment at the time of their injuries, the judgments are affirmed.

AFFIRMED.